Supreme Court, U.S.
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No. 88-951

In The
Supreme Court of the United States
October Term, 1988

—o—

DOROTHY WILLNER,

Petitioner,

vs.

UNIVERSITY OF KANSAS, GENE BUDIG, ARCHIE R. DYKES, DELBERT M. SHANKEL, FRANCES D. HOROWITZ, ROBERT P. COBB, DEANELL TACHA, ROBERT L. LINEBERRY, ROBERT S. HOFFMAN, ROBERT J. SQUIER, ANTA MONTET-WHITE, ALFRED E. JOHNSON, MICHAEL CRAWFORD, JOHN M. JANZEN, F. ALLAN HANSON, FELIX MOOS, DAVID FRAYER, ROBERT J. SMITH, DONALD STULL,

Respondents.

—o—

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

—o—

REPLY BRIEF FOR PETITIONER

—o—

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No. 88-951

In The

Supreme Court of the United States

October Term, 1988

DOROTHY WILLNER,

Petitioner,

vs.

UNIVERSITY OF KANSAS, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

PETITIONER'S REPLY BRIEF

I

In *Liljeberg v. Health Services Corp.*, — U.S. —, 108 S.Ct. 2194, 100 L.Ed.2d 855, this Court upheld the disqualification under 28 U.S.C. § 455 of a trial judge who had served as a university trustee where the university was involved in dealings with a party. This Court also upheld vacatur when the motion to recuse had been made approximately ten months after judgment had been entered, since the motion to vacate had been promptly filed.

The standard mandated by *Liljeberg* applies to the instant case. *See* Pet. 11-12. Judge Rogers was a member

of one of respondent University of Kansas' governing bodies, the Board of Governors of its Law School, while this case was before him. Respondents' allegation that petitioner sought Judge Rogers' disqualification because of a position in "the KU Law Society" (Resp. Br. 8) is false on face of the record which respondents themselves have appended (Resp. Br. App. A17).

Respondent KU's own procedures, specified in its *Handbook for Faculty and Other Unclassified Staff,* calls on members of its Law School to consider and decide personnel matters throughout the University. They serve on its Judicial Board which mediates in cases where the University brings charges against its employees including tenured faculty to the prejudice of their employment. The Judicial Board also hears disputed cases of promotion, appointment, reappointment and non-reappointment of faculty. *See* App. 1-4, *infra.*

The record already before this Court shows that Judge Rogers' findings against petitioner after her trial before him under the Equal Pay Act and Title VII laid the basis for KU to bring charges against her to alter or terminate her employment. *See* Pet. App. A61, A133-135. Judge Rogers thereby involved members of KU's Law School in prospective prejudicial personnel decisions against her.

It is indisputable that petitioner timely sought the disqualification of Judge Rogers. *See* Pet. 7-8.

Adams v. United States, 302 F.2d 307, 309 (5th Cir. 1962), which respondents cite, is inapplicable not only because it is moot but also because the facts differ. In

Adams, disqualification of the trial judge was not sought during trial or on first appeal. In contrast, petitioner herein timely sought the disqualification of Judge Rogers before trial.

Smith v. Danyo, 585 F.2d 83, 86 (3d Cir. 1978), which respondents cite and quote (Resp. Br. 4-5) supports petitioner. In *Danyo,* where the issue of timeliness was limited to disqualification under § 144, the Third Circuit stated at 86

> . . . when the circumstances giving rise to the charge of bias occur or are discovered after the case has commenced, timeliness should be measured not in some absolute and arbitrary manner from the date of discovery but with respect to the future stages of the case . . .

Since some circuits have chosen to treat § 455 as if it were identical to § 144 in its timeliness requirement, *Danyo* adds to the evidence of disarray in the circuits on the issue of timeliness.

Respondents misconstrue the holding of the Fifth Circuit in *Delesdernier v. Porterie,* 666 F.2d 116, 121, 122 (5th Cir. 1982), *cert. den.,* 459 U.S. 839 (1982), which they cite (Resp. Br. 4, 5). The Fifth Circuit stated in *Delesdernier* at 121 "that timeliness may not be disregarded in *all* cases regarding disqualification under § 455(a)" (emphasis provided). The Fifth Circuit found the specific facts of *Delesdernier* "well suited to a timeliness requirement," since "the trial judge raised the possibility of disqualifying himself at the very beginning" and "before trial began gave a full and fair disclosure . . ." The contrast with the facts of the instant case could not be more com-

plete. *Delesdernier* either is inapplicable or else it supports petitioner.

The cases of *Parrish v. Board of Commissioners of Alabama State Bar,* 525 F.2d 98 (5th Cir. 1975) (*en banc*), *cert. den.,* 425 U.S. 944 (1976), and *Brody v. President & Fellows of Harvard College,* 664 F.2d 10 (1st Cir. 1981), *cert. den.,* 455 U.S. 1027, 102 S.Ct. 1731, 72 L.Ed.2d 148, cited by respondents (Resp. Br. 8-9), are also inapplicable. The activities of the judge in Parrish found insufficient for disqualification included no more than presidency of the county bar association of Montgomery County and acquaintanceship or friendship with witnesses and defense counsel. The judge in *Brody* was no more than an alumnus or graduate of Harvard College.

Respondents falsely allege that "now for the first time petitioner presents . . . the new allegation that the district judge served as a director of the University of Kansas Endowment Association . . ." (Resp. Br. 2). The record already before this Court shows that petitioner alleged this on June 16, 1988, in her Petition for Rehearing in Appeal No. 86-2678 (*See* Pet. 8, A136), having earlier alleged this in oral argument before the Tenth Circuit on December 15, 1987. Respondent KU's Endowment Association not only has officers, committees, trustees and advisory trustees. It also has various fund-raising programs which have their own officers, boards and bodies drawn, *inter alia,* from KU's alumni and alumnae. On September 21, 1986, when Myra Hinman disclosed to petitioner that Judge Rogers was a director of KU's Endowment Association, she did not state the specific program and year he served. Although the Tenth Circuit ruled in

Hinman v. Rogers, 831 F.2d 937, 940 (10th Cir. 1987) that "the allegations in the recusal requests do not support the claim that the judge has a financial interest" in respondent KU's Endowment Association, it failed to take cognizance of Judge Rogers' strong personal interest in fundraising efforts for respondent KU.

II

Respondents err on face of record in arguing that there is no merit in petitioner's claim that the district court created a burden on the exercise of her religion by its order of September 19, 1984 (*See* Res. Br. A24-A26). It is incontestable that Jewish religious observance required petitioner to abstain from all work from (a) sundown of September 26, 1984 to nightfall of September 28, 1984 (the two days of Rosh HaShana), (b) sundown of September 28, 1984, to nightfall of September 29, 1984 (Sabbath of Penitence), (c) from sundown of October 5, 1984, to nightfall of October 6, 1984 (Yom Kippur and Sabbath). It is incontestable that petitioner had apprised the district court on two separate occasions prior to the date it issued its order of September 19, 1984, of her commitment to Judaism. She did so in a motion filed September 12, 1984 (*See* App. 8-9, *infra*). She did so again during the hearing of September 18, 1984. On September 18, 1984, she also apprised the district court that the solemn Jewish High Holy Days period was approaching. On September 21, 1984, prior to receipt of the Court's order of September 19, 1984, she provided the Court with the specific dates of the Jewish High Holy Days period (*See* Pet. A99). On September 24, 1984, as soon as possible after receipt of the Court's order of September 19,

1984, she *filed* a motion requesting a ten day extension of said order because

> "Rosh HaShana, the Jewish New Year, falls on September 26 through 28 followed by the Sabath between Rosh HaShana and Yom Kippur, the Day of Atonement."

She again stated that she is devout.

In 1984, Judaism was not an obscure cult in the United States. Temple Beth Sholom already existed in Topeka in 1966 when petitioner began teaching at respondent University. Respondent KU had by 1984 already taken notice of the Jewish High Holy Days. Respondents err in alleging that the Jewish High Holy Days require presence in synagogue (Resp. Br. 11).

Contrary to erroneous statements by the Tenth Circuit, petitioner did not have "ample time to comply with the Court's order prior to the commencement of her religious observances" (*See* Pet. A8). On the contrary, the district court knowingly allowed her no more than *four* days between September 22, 1984 (*See* F.R.Civ.P. 6(a) and (e)) and sundown, September 26, 1984, to supplement her answers to respondents' interrogatories before the onset of Rosh HaShana. Moreover, September 22, 1984 was the Sabbath preceding Rosh HaShana. The district court also knew that petitioner had full-time teaching obligations in connection with her employment; yet its order of September 19, 1984, specifically prohibited her from supplementing her answers to interrogatories by xeroxing and attaching the pertinent pages of her deposition. *See* Opp. Br. 25-26.

Respondents argue (Opp. Br. 11) that "the crux of a First Amendment freedom of religion claim is a governmentally imposed pressure on a person to forego the practice of a faith in such way that the person is forced to choose between following the precepts of the religion and complying with the requirements set by the state." Respondents could not more accurately describe the burden of choice unreasonably put on petitioner. The judiciary incontestably is one arm of the government. The district court's order of September 19, 1984 imposed pressure which forced petitioner to choose between observing Rosh HaShana, the Sabbath of Penitence and Yom Kippur according to the practice of her faith and supplementing respondents' interrogatories in "but ten days" (Opp. Br. A25). This Court's holdings in *Sherbert v. Verner,* 374 U.S. 398, 404, 83 S.Ct. 1790, 10 L.Ed. 2d 965, 970 (1963) and *Abington School District v. Schempp,* 374 U.S. 203, 223, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) support petitioner.

United States v. Fisher, F. Supp. 1236 (S.D.N.Y. 1983), cited by respondents (Opp. Br. 12), is inapplicable to the instant case in the light of the different fact situations. In *Fisher,* the compelling state interest which weighed against the request not to hold trial on Fridays was the burden this would put on six other defendants and a jury. In contrast, the instant case still was in the discovery stage when the district court entered its order of September 19, 1984, and it failed to assert a compelling reason or one not otherwise serving to overbalance petitioner's legitimate claim to the free exercise of religion. *See Wisconsin v. Yoder,* 406 U.S. 205, 215, 92 S.Ct. 1526,

1533, 32 L.Ed.2d 15 (1972), cited in *Fisher* at 1238. Furthermore, the Tenth Circuit as well as the district court failed to assert any overriding or compelling state interest to warrant the coercive effect of the district court's orders as they operated against petitioner in the practice of her religion. *See Abington, supra.*

United States v. Thomas, 757 F.2d 1359 (2d Cir. 1985), *cert. den.,* 373 U.S. 819 (1985), cited by respondents (Opp. Br. 12), supports petitioner. The Second Circuit held that, under the "collateral order" exception to the final judgment rule, the decision to hold trial on Fridays should have been appealed immediately after the trial court entered its order. According to this standard, petitioner properly appealed the trial court's order of October 15, 1984 (Pet. A26-A29) as a final order (*See* App. 10-11, *infra*).

Roadway Express, Inc. v. Piper, 447 U.S. 752, 763, 100 S.Ct. 2455, 65 L.Ed.2d (1980), cited by respondents (Opp. Br. 12), is inapplicable. This Court found in *Roadway* at 499 that the respondents in that case never complied with the district court's order to answer Roadway's interrogatories. In contrast, the petitioner in this case complied with the district court's order of September 19, 1984 to supplement interrogatories as ordered absent four days of abstention from work in the exercise of her religion. The record already before this Court (Pet. 8; A113-117) disproves respondents' untrue allegations (Opp. Br. 12) of willfulness and unjustified default after petitioner's receipt of the Magistrate's order of March 5, 1984.

National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 642, 96 S.Ct. 2778, 49 L.Ed.2d 747 (1976),

cited by respondents (Opp. Br. 12), supports petitioner. This Court held at 641-642 that the district court was required to consider the full record in determining whether to dismiss for failure to comply with discovery orders. The full record establishes petitioner's complete good faith (*See* Pet. A105-A118).

The courts below have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Respectfully submitted,

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APPENDIX A

University of Kansas Handbook for Faculty and Other Unclassified Staff. Page 45

* * *

c. If inadequate consideration in terms of the established *criteria* is alleged, *the case can go to mediation (Part II)*. The Committee on Mediation may, if it sees fit, seek reconsideration by appropriate bodies of the decision not to reappoint, but it may not substitute its judgment on the merits of the case. There is no provision for formal hearings. (Emphasis added)

2. Dismissal or termination of appointment of a nontenured faculty member *prior* to the end of his or her term of appointment; *dismissal or termination of a tenured faculty member.* These cases can go to mediation (Part II) and to formal hearings (Part III); the Chancellor is the charging party and the burden of proof is on him or her. If a faculty member alleges that he or she was dismissed in violation of academic freedom, the provisions of Part III shall apply. (Emphasis added)

3. Violation of academic freedom that does not involve dismissal of a tenured faculty member or of a nontenured faculty member during his/her term of appointment. The case can go to mediation (Part II) and if necessary to formal hearing (Part IV); in formal hearings the burden of proof is on the faculty member.

As a final clarification, it should be noted that the University Senate Code (Article XV, Section 3) gives the Committee on Tenure and Related Problems "original jurisdiction" within the University "over any claim . . . by a member of the faculty that an administrative action constitutes (i) a violation of the tenure rights of a tenured

member of the faculty; (ii) a termination without proper cause of the services of a non-tenured member of the faculty prior to the end of the term of his/her appointment; (iii) a violation of established University procedures for the appointment, promotion or reappointment of a tenured or non-tenured faculty member or the non-reappointment of a non-tenured member of the faculty; (iv) a violation of the academic freedom of a tenured or non-tenured member of the faculty; (v) a censure, suspension or dismissal pursuant to Article VI of the Faculty Code of Conduct without proper cause; or (vi) the placing of a faculty member on administratively determined Leave Without Pay pursuant to Article IV of the Faculty Code of Conduct without proper cause." For dismissals resulting from a formal declaration of a state of Financial Exigency, the procedures set forth in Article VII of the "Rules and Regulations of the University Senate" apply and in cases of conflict take precedence over the procedures described below.

Part II: Mediation Procedures

For the mediation phase the chairperson of the *Judicial Board* shall, upon request of the chairperson of the Committee on Tenure and Related Problems, establish a mediation panel as provided for in the University Senate Rules and Regulations 5.3.3, 6.6.1.3, and 6.6.1.4. Such mediation panel shall proceed as provided for in the University Senate Rules and Regulations 6.6.1.4, except that its report shall be rendered to the chairperson of the Committee on Tenure and Related Problems. The mediation phase may neither be waived nor omitted. (Emphasis added)

* * *

ganizational entity rather than the unit; appeal could then be made to the Judicial Board.

5.2.3 *Review and Approval.* Any organizational entity or unit that has developed a grievance procedure shall submit it to the General Counsel of the University. Unless the General Counsel determines that the procedure as submitted is in conflict with existing law, rules of the Board of Regents, or rules or regulations of the University, it shall become effective thirty calendar days after such submission.

5.2.3.1 Any unit which has elected to place itself under the grievance procedure of the respective larger entity shall report this election in writing to the chairperson of the Judicial Board, with information copies to the General Counsel of the University, the Office of Affirmative Action, and the University Ombudsman.

5.2.4 *Dissemination of Information.* Information concerning the procedure adopted by a unit shall be be easily available to all persons employed in or using the services of the unit. Copies of the procedures shall also be placed on file in the Office of Affirmative Action, with the University Ombudsman, and the chairperson of the Judicial Board, and shall upon request be made available to the administrators of other University units.

5.2.5 *Change and Amendments.* Any change of or amendment to a grievance procedure shall be subject to review and approval as provided in 5.2.3, above, and updated copies disseminated as provided in 5.2.4, above.

Section 3. *The Judicial Board*

5.3.1 *Chairperson.* The *law member* serving in his or her third or final year as member of the Judicial Board shall serve as chairperson of the Board. If, by reason of absence, disability or disqualification, the chairperson is unable to serve, the *law member* next senior in terms of service on the Judicial Board shall assume the chairperson's *duties.* (Emphasis added)

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DOROTHY WILLNER, Plaintiff,	)	
v.	)	Case No. 82-4291
UNIVERSITY OF KANSAS, et al. Defendants.	)	

PLAINTIFF PRO SE'S REQUEST FOR RECONSIDERATION

(Filed Sept. 12, 1984)

COMES NOW plaintiff pro se Dorothy Willner and, pursuant to instructions from the Court transmitted by the Clerk on August 31, 1984, respectfully requests the Court to reconsider its dismissal of her claims under 42 U.S.C. 1981. In support hereof, plaintiff states:

1. On December 14, 1983, she asked for additional time to reply to defendants' Motion to Dismiss.

2. Although the Court granted plaintiff's motion, as stated by Honorable Richard D. Rogers in a footnote on p. 2 of his Memorandum and Order of August 29, 1984, plaintiff pro se had not, in fact, received a copy of said Order granting plaintiff's motion of December 14, 1983. Plaintiff was not apprised of the Minute Order granted by Judge Rogers and filed on December 22, 1983, until she received the Memorandum and Order filed August 30, 1984.

3. In support of her request to the Court to reconsider her claims under 42 U.S.C. 1981, plaintiff again brings forward the facts referred to in paragraph 7 of her Complaint, said facts having been previously set forth in her charges to the Equal Employment Opportunity Commission, charges for which said federal agency after due investigation found probable cause.

4. Plaintiff's charges to said federal agency included retaliation by defendant University and individual defendants because plaintiff protested a violation of defendant University's contract with the Kansas Commission on Civil Rights. One of the original petitioners to the Kansas Commission on Civil Rights (See Exhibit A, letter of Frank L. Ross to plaintiff dated August 4, 1976) for the investigation (KCCR Case No. I-16-73) which resulted in the Agreement signed by Archie Dykes, then Chancellor of defendant University, and by Anthony D. Lopez in June and July of 1976 (See Exhibit B), plaintiff pro se protested a violation of said agreement in Spring 1977 by defendant University and individual defendants. Said violation involved the appointment of defendant Stull, a white male, to a tenure track position in defendant University without said position having been duly advertised (See Exhibit C, plaintiff's letter to Bonnie Ritter of the Office of Affirmative Action of defendant University dated May 16, 1977).

5. Plaintiff's protest was taken on behalf of minority groups members of which could have applied for said position had it been duly advertised. Plaintiff personally knew one Native American woman anthropologist and one Black male anthropologist qualified for said position who almost certainly would have applied for it, had it been

advertised in conformity with the provisions of the Agreement between the University of Kansas and the Kansas Commission on Civil Rights.

6. Plaintiff was reprised against for her protest by all members of the Department of Anthropology then in residence led by defendants Squier and White in a faculty meeting called for said purpose held on May 19, 1977 (see Exhibit D, Minutes of Faculty Meeting of May 19, 1977; and Exhibit E, plaintiff's own notes on said faculty meeting). Said meeting was held with the full knowledge of and acceptance by administrators of defendant University, plaintiff having appealed to defendant Horowitz to intervene and having appealed in vain. Said violation was later investigated by the Kansas Commission on Civil Rights (see Exhibit F, letter of William V. Minner to plaintiff of March 3, 1978). Reprisals against plaintiff stemming from this fact situation have continued to the present.

7. Plaintiff advanced claims under 42 U.S.C. 1981 in her original Complaint. She now asks that these claims be reconsidered on the basis of the fact situation just reviewed, said facts establishing a nexus between the protected activity under 42 U.S.C. 1981 and the retaliatory actions. Under 1981 "all persons" protected can include white persons. *McDonald v. Santa Fe Trail Transp. Co.* (1976), 427 U.S. 273, 49 L.Ed.2d 493, 96 S.Ct. 2574. Furthermore, the Supreme Court has held in *Sullivan v. Little Hunting Park,* 396 U.S. 229, 90 S.Ct. 400, 24 L.Ed.2d 386 (1969), that a white person who has been . . . punished for trying to vindicate the rights of non-white) minorities . . ." has standing to sue under 1981. See also *De Matteis v. Eastman Kodak Co.* (1975, CA 2 NY), 511 F.2d 306, on

reh (CA2 NY) 520 F.2d 409. Also supporting the claim that non-blacks have standing to maintain a 1981 action for injuries they suffer as a result of discrimination aimed at blacks is *Riccobono v. Whitpain Township* (1980, ED Pa), 497 F.Supp. 1364. Furthermore, the Court of Appeals for the Eighth Circuit has ruled that a claim of employment discrimination based upon retaliation is cognizable under 1981. *Sisco v. J. S. Alberici Constr. Co.* (1981, CA8 Mo), 655 F.2d 146, cert. den. (U.S.) 71 L.Ed.2d 688, 102 S.Ct. 1485; accord, *Goff v. Continental Oil Co.* (1982, CA5 Tex), 678 F.2d 593, on remand (S.D. Tex.) 31 BNA FEP Cas 417, 31 CCH EPD 33442; *London v. Coopers & Lybrand* (1981, CA9 Cal.), 644 F.2d 811; *Setser v. Novack Invest. Co.* (1981, CA8 Mo.), 638 F.2d 1137, amd, en banc (CA8 Mo.) 657 F.2d 962, cert. den. (U.S.) 70 L.Ed.2d 601, 102 S.Ct. 615.

8. Plaintiff pro se also respectfully brings before the Court the fact that Hasidic Jews are now considered by the Federal Government to be a disadvantaged minority, joining six other groups in that category including Blacks, Native Americans, Eskimos, Aleuts, Puerto Ricans and Spanish-Speaking Americans. Hasidic Jews observe Jewish law and ritual in a fashion which renders them highly visible in general American society. Plaintiff herself is not a Hasidic Jew, although relatives in the past and friends in the present fall within this class. Nonetheless, plaintiff is prepared to argue before the Court, from her expert status as a cultural anthropologist, that it is the group definition of a person and of the person's class membership which renders said person a visible member of a minority group. Plaintiff claims that her commitment to Judaism and her research in and identification

with the State of Israel have given her the same visible minority status as a Jew in the Anthropology Department of defendant University as that of Hasidic Jews in the larger society. Plaintiff's commitment to vindicating the rights of all minorities, including Blacks and Native Americans, derives, in part, from her cultural heritage and personal knowledge of the discrimination to which Jews, as well as Blacks and other protected minorities under Federal law, have been subjected.

WHEREFORE, plaintiff pro se prays the Court to restore her claims under 42 U.S.C. 1981.

/s/ Dorothy Willner
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Plaintiff pro se
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APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

DOROTHY WILLNER,	)	
	)	
Plaintiff,	)	
	)	
v.	)	
	)	
UNIVERSITY OF KANSAS,	)	
ARCHIE R. DYKES,	)	Civil Action, File
DELBERT M. SHANKEL,	)	No. 82-4291
FRANCES D. HOROWITZ,	)	
ROBERT P. COBB,	)	Notice of Appeal
ROBERT S. HOFFMAN,	)	
ROBERT J. SQUIER,	)	
ANTA MONTET WHITE,	)	
FELIX MOOS, JOHN M.	)	
JANZEN, MICHAEL	)	
CRAWFORD, DAVID	)	
FRAYER, DONALD STULL,	)	
	)	
Defendants.	)	

(Filed Dec. 26, 1984)

Notice is hereby given that Dorothy Willner, the plaintiff above named, hereby appeals to the United States Court of Appeals for the Tenth Circuit from the final orders of the District Court of Kansas at Topeka, Kansas, entered on the 15th day of October, 1984 and the 6th day of December, 1984, denying plaintiff's motion for a ten day extension of time to supplement interrogatories in order that plaintiff observe the Jewish High Holy Days of Rosh HaShana, the Jewish New Year, Yom Kippur, the Day of Atonement, and the Sabbath between Rosh

HaShana and Yom Kippur with their requirement that persons of the Jewish faith abstain from all work and engage in prayer and repentance. Plaintiff is a practicing Jew and, therefore, was bound to observe properly the aforesaid High Holy Days in the manner specified by the tenets of her religion. Dated this 26th day of December, 1984.

/s/ Dorothy Willner
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